

RECEIVED
CENTRAL FAX CENTER

FEB 03 2010

Doc Code: AP.PRE.REQ

PTO/SB/33 (07-05)

Approved for use through xx/xx/200x. OMB 0651-00xx
U.S. Patent and Trademark Office; U.S. DEPARTMENT OF COMMERCE

Under the Paperwork Reduction Act of 1995, no persons are required to respond to a collection of information unless it displays a valid OMB control number.

PRE-APPEAL BRIEF REQUEST FOR REVIEW		Docket Number (Optional) MSDI-260/PC853.00	
I hereby certify that this correspondence is being deposited with the United States Postal Service with sufficient postage as first class mail in an envelope addressed to "Mail Stop AF, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450" (37 CFR 1.8(a)) on <u>February 3, 2010</u> Signature <u><i>Douglas A. Collier</i></u> Typed or printed name <u>Douglas A. Collier</u>		Application Number 10/795,880 First Named Inventor Regis W. Haid, Jr. Art Unit 3733	Filed March 8, 2004 Examiner David C. Comstock
Applicant requests review of the final rejection in the above-identified application. No amendments are being filed with this request. This request is being filed with a notice of appeal. The review is requested for the reason(s) stated on the attached sheet(s). Note: No more than five (5) pages may be provided.			
I am the <input type="checkbox"/> applicant/inventor. <input type="checkbox"/> assignee of record of the entire interest. See 37 CFR 3.71. Statement under 37 CFR 3.73(b) is enclosed. (Form PTO/SB/96) <input checked="" type="checkbox"/> attorney or agent of record. Registration number <u>43,556</u> <input type="checkbox"/> attorney or agent acting under 37 CFR 1.34. Registration number if acting under 37 CFR 1.34 _____		<u><i>Douglas A. Collier</i></u> Signature <u>Douglas A. Collier</u> Typed or printed name <u>(317) 238-6333</u> Telephone number <u>February 3, 2010</u> Date	
NOTE: Signatures of all the inventors or assignees of record of the entire interest or their representative(s) are required. Submit multiple forms if more than one signature is required, see below*.			
<input type="checkbox"/> Total of _____ forms are submitted.			

This collection of information is required by 35 U.S.C. 132. The information is required to obtain or retain a benefit by the public which is to file (and by the USPTO to process) an application. Confidentiality is governed by 35 U.S.C. 122 and 37 CFR 1.11, 1.14 and 41.6. This collection is estimated to take 12 minutes to complete, including gathering, preparing, and submitting the completed application form to the USPTO. Time will vary depending upon the individual case. Any comments on the amount of time you require to complete this form and/or suggestions for reducing this burden, should be sent to the Chief Information Officer, U.S. Patent and Trademark Office, U.S. Department of Commerce, P.O. Box 1450, Alexandria, VA 22313-1450. DO NOT SEND FEES OR COMPLETED FORMS TO THIS ADDRESS. SEND TO: Mail Stop AF, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450.

If you need assistance in completing the form, call 1-800-PTO-9199 and select option 2.

RECEIVED
CENTRAL FAX CENTER

FEB 03 2010

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re patent)	
application of:)	Before the Examiner:
Regis W. Haid, Jr. et al.)	David C. Comstock
)	
Serial No. 10/795,880)	Group Art Unit:
)	3733
Filed: March 8, 2004)	
)	February 3, 2010
OCCIPITAL AND CERVICAL)	
STABILIZATION SYSTEMS AND)	Atty. Docket No.:
METHODS)	MSDI-260/PC853.00

PRE-APPEAL BRIEF REQUEST FOR REVIEW

Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

In response to the Final Office Action mailed October 6, 2009, and Advisory Action mailed January 21, 2010, please enter and consider the following remarks along with the Pre-Appeal Brief Request for Review and Notice of Appeal. The fee for the Notice of Appeal is enclosed along with a one month extension of time to and including February 21, 2010 (one month from the mailing date of the Advisory Action in view of Applicants' response to the Final Office Action within two months thereof). No additional fees or extensions of time are believed due for consideration of the enclosed. However, please provide any extensions of time necessary and charge any additional fees which may be due, or credit any overpayment, to Deposit Account No. 12-2424, but not to include any payment of issue fees.

I hereby certify that this correspondence is being facsimile transmitted to the USPTO or deposited with the United States Postal Service with sufficient postage as first class mail in an envelope addressed to the Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450 on the date shown below:

February 3, 2010

Date of Transmission

Douglas A. Collier

Name of Registered Representative

Signature

February 3, 2010

Date of Signature

Pre-Appeal Brief Request for Review
Ser. No 10/795,880
Atty Docket No.: MSDI-260/PC853.00

REMARKS

In the Final Office Action mailed October 6, 2009, and Advisory Action mailed January 21, 2010, claims 1, 2, 9-21, 23-39 and 55-58 were pending. Claims 23 and 24 were withdrawn from consideration, and claims 1, 2, 9-11, 16-21, 25-39 and 55-57 were rejected. Claims 12-15 and 58 were objected to but indicated to be allowable if rewritten in independent form incorporating the base claim and any intervening claims.

Claims 1, 2, 9-11, 16-21, 25-39 and 55-57 stand rejected under 35 USC §102(b) as being anticipated by U.S. Patent No. 2,699,774 to Livingston. Claims 1 and 25 are independent claims. In the Final Office Action, the Examiner acknowledged that Livingston does not "explicitly recite that the device may have a configuration wherein each of the members have a curved configuration along a longitudinal axis that extends between a leading end and a trailing end of the device." On page 4 of the Final Office Action, the Examiner provided a reproduction of Fig. 6 of Livingston and asserted that the inner and outer members form an arc along a length of the device as indicated by the bold lines drawn by the Examiner on the Fig. 6 reproduction. Arguments traversing the Examiner's rejection were provided on pages 9-10 of Applicant's response to the Final Office Action, filed on December 1, 2009.

Claim 1 recites, among other features, "an elongated stabilization device including an elongated outer member and an elongated inner member movably received in said outer member, said inner and outer members each including a curved configuration along a longitudinal axis that extends along a length of said stabilization device between a leading end and an opposite trailing end of said stabilization device, said stabilization device further maintaining said curved configuration when in a collapsed insertion configuration and an expanded engagement configuration, wherein said curved configuration of each of said inner and outer members forms an arc along a length of said stabilization device and said arc and said longitudinal axis are co-linear along said length in each of said collapsed insertion configuration and said expanded engagement configuration...."

Livingston does not disclose or teach these features associate with the inner and outer members. Livingston discloses an inner rod 37 that is linear when outer shell 19 is collapsed and when outer shell 19 is enlarged. The portion of the inner rod 37 of Livingston asserted to include the curved configuration is not curved nor is it configured in the manner recited in claim 1. Rather, this portion of the inner member, as shown in Fig. 6 of Livingston, includes a threaded

section and a frusto-conical section extending from the threaded section. The threaded and frusto-conical sections of rod 37 are not curved to form an arc, and are linear along the longitudinal axis of rod 37.

Furthermore, even if these sections of inner rod 37 were somehow considered to form an "arc" as asserted in the Final Office Action, inner rod 37 and outer shell 19 still do not disclose the arrangement of the inner and outer members recited in claim 1. For example, inner rod 37 and outer shell 19 do not each include a curved configuration along a longitudinal axis that extends along a length of said stabilization device between a leading end and an opposite trailing end of the device, with the device further maintaining the curved configuration when in a collapsed insertion configuration and an expanded engagement configuration. Livingston discloses that outer shell 19 tapers from its larger cross-sectional base portion 22 to a smaller cross-sectional entrance portion 23. Outer shell 19 is split at its entrance portion with lateral slits 24 to form expansible portions 25 and is split at its trailing end with slits 30. When inner rod 37 is inserted into the bore of outer shell 19, it engages the expansible portions 25, 31 to outwardly expand outer shell 19 to arrive at the configuration of Figure 6, which substantially differs from its collapsed configuration. There is no disclosure in Livingston that outer shell 19 includes the configuration of Figure 6 when it is in a collapsed insertion configuration.

In addition, claim 1 recites "wherein said curved configuration of each of said inner and outer members forms an arc along a length of said stabilization device and said arc and said longitudinal axis are co-linear along said length in each of said collapsed insertion configuration and said expanded engagement configuration". Assuming *arguendo* that Figure 6 discloses inner rod 37 with an "arc", the inner rod 37 and the outer shell 19 do not each include a curved configuration that forms an arc that is co-linear with the longitudinal axis of the inner rod 37 and outer shell 19.

The Advisory Action asserts that Applicant has not considered "all of the language of the claims including the language 'along' as set forth throughout the independent claims. According to the claims, the longitudinal axis can be located 'along' ('along' is a preposition meaning 'through, on, beside, over, or parallel to the length or direction of') a length of the device; moreover, the arc and longitudinal axis must only be co-linear 'along' the length." Since arcs and a longitudinal axis of Livingston are situated within the scope of the claims,

the rejection has been maintained.” It is respectfully submitted that the Examiner has not considered that claim 1 recites an arrangement where the curved configuration of each of the inner and outer members forms an arc that is co-linear with the longitudinal axis. In Livingston, the identified “arcs” of outer shell 19 and inner rod 37 are offset from one another and thus do not each form an arc that is co-linear with the longitudinal axis. Furthermore, as discussed above, there is no disclosure in Livingston that outer shell 19 even forms an arc when in its collapsed configuration, let alone having a curved configuration in its collapsed configuration such that inner rod 37 and outer shell 19 each form an arc that is co-linear with a longitudinal axis of the device in the collapsed configuration.

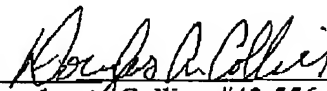
Pending claims 2, 9-11, 16-21, and 57 depending from claim 1 distinguish Livingston at least for the reasons claim 1 does. Withdrawal of the rejection of claims 2, 9-11, 16-21, and 57 depending from claim 1 is respectfully requested.

Livingston also does not disclose independent claim 25. Claim 25 recites, among other features, “wherein said inner member and said outer member each include a curved configuration along said longitudinal axis that extends along said length of said stabilization device between said leading end and said opposite trailing end of said stabilization device, and in said curved configuration each of said inner member and said outer member forms an arc that is co-linear with said longitudinal axis along said length of said stabilization device.” As discussed above with respect to claim 1, Livingston fails to disclose or teach these features of the inner and outer member. Thus, claim 25 is allowable and withdrawal of the rejection thereof is respectfully requested.

Pending claims 26-39 and 55-56 depending from claim 25 distinguish Livingston at least for the reasons claim 25 does. Furthermore, the basis for rejecting claims 30 and 56 is not clear. Claims 12 and 58 were indicated to be allowable in the Final Office Action, but claims 30 and 56 are directed to features similar to those in claims 12 and 58 for which the Office Action fails to provide any prior art teaching or disclosure. Therefore, a prima facie case for the rejection of claims 30 and 56 has not been established.

Reconsideration of the present application including claims 1, 2, 9-21, 23-39 and 55-58 is respectfully requested.

Respectfully submitted:

By: 
Douglas A. Collier, #43,556
Krieg DeVault LLP
One Indiana Square, Suite 2800
Indianapolis, IN 46204
Direct (317) 238-6333

KD_IM-2538682_1.DOC